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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ISRAEL G. GROSSMAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a federal prosecution, the defendant must prove specific prejudice in order to establish that his Fifth and Sixth Amendment rights have been violated when he is forced to trial two business days after the return of a superseding indictment which, among other things, added ten new counts and radically changed the nature, scope and time frame of the case against which he had to defend.

2. Whether criminal sanctions may be imposed upon an attorney under Section 10(b) of the Securities Exchange Act and Rule 10b-5 for "misappropriating" information from his law firm and its client where the law firm and the client -- neither of

which purchased securities from nor sold securities to Petitioner -- are the alleged victims of the fraud.

3. Whether confidential information about a proposed recapitalization entrusted to a law firm by a client for the limited purpose of obtaining legal advice is "property" of the law firm or the client within the meaning of the mail fraud statute where the information was not commercial information gathered or developed by the client or the law firm, where neither the client nor the law firm had the right to use the information for any commerical purpose, and where the only injury which could arise from misappropriation of the information was injury to the law firm's reputation.

4. Whether a defendant is entitled under Brady v. Maryland to access to admittedly exculpatory grand jury testimony of an alleged co-conspirator who does not testify at trial but whose hearsay statements inculpating the defendant are introduced through another prosecution witness.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., amend. V provides, in pertinent part:

> No person shall be ... deprived of life, liberty, or property, without due process of law.

U.S. Const., amend. VI provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; ....to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), provides, in pertinent part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interestate commerce or of the mails, or of any facility of any national securities exchange ....
>
> To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered,

> any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5, 17 C.F.R. §240, 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any national securities exchange,
> (a) to employ any device, scheme, or artifice to defraud,
> (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, 'in connection with the purchase of sale of any security.'

The mail fraud statute, 18 U.S.C. §1341, provides, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting so to do [uses the mails or causes them to be used,] shall be fined not more than $1,000 or imprisoned not more than five years, or both.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit in United States v. Grossman is reported at 843 F.2d 78 (2d Cir. 1988), and is set forth in the appendix at A-1.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Second Circuit was entered on March 25, 1988. (A-1) The order denying a petition for rehearing and suggestion for rehearing en banc was entered on May 9, 1988. (A-21) On motion of the Petitioner, Justice Thurgood Marshall granted Petitioner's request that the time for filing a petition for a writ of certiorari be extended to and including August 5, 1988. (A-23)

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Second Circuit under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On March 17, 1987, the grand jury for the Southern District of New York returned a 24 count indictment which charged Petitioner Israel G. Grossman with 12 paired counts of securities fraud and mail fraud premised on the Second Circuit's controversial "misappropriation" theory of securities fraud. The indictment charged that Grossman, an attorney employed as an associate in the pension department of the New York law firm of Kramer, Levin, Nessen, Kamin & Frankel ("Kramer, Levin"), committed, or aided and abetted the commission of, securities fraud and mail fraud in connection with purchases of options to buy shares of Colt Industries, Inc. ("Colt" or "the company").

The indictment alleged that Kramer, Levin represented not Colt, but the Trustees of Colt's Pension Plan, and that the Pension

Plan, an owner of Colt stock, had entrusted to the law firm confidential, non-public information it had received from Colt regarding a proposed recapitalization of the company. Under the recapitalization proposal, each shareholder except the Pension Plan would receive $85 cash and a share in the newly capitalized company. (The company's shares were trading at $66 to $70 at the time.) The Pension Plan would receive, pursuant to a certain formula, only shares, no cash. Kramer, Levin was retained by the Trustees of the Plan to advise whether the proposal was fair and whether it should be approved. The indictment also alleged that the law firm had a policy forbidding its employees from trading in securities on the basis of confidential, non-public information and forbidding the disclosure of confidential information to others.

The 12 securities fraud counts charged that, between July 11 and July 18, 1986, Petitioner Grossman engaged in a scheme to defraud Kramer, Levin and its "clients" "in connection with" certain purchases of Colt stock options by George Hirschberg, Walter Herzberg, and Norman Stein. Hirschberg and Herzberg were, respectively, Grossman's uncle and cousin. Stein was not related to Grossman but was a friend of Shimon Lev, the husband of one of Grossman's cousins.

The indictment included 12 matching mail fraud counts based on the 12 purchases of Colt options. The alleged mailings were, in each instance, the mailing of brokerage confirmations by the broker or clearinghouse to the option purchaser, Hirschberg, Herzberg or Stein.

Trial was scheduled to commence on Monday, August 3, 1987. On Thursday, July 30, 1987, just two business days before the trial date, a superseding indictment was returned over the defendant's vigorous claims of prejudice.

The new indictment differed in several important respects from the original one. This indictment spelled out in greater detail the government's misappropriation theory. More significantly, unlike the initial indictment, it put Petitioner on notice, for the first time, that the government claimed that he had personally benefited from the scheme. In addition, it extended the term of the alleged fraudulent scheme. The original indictment charged a scheme which occurred during a discreet period in July of 1986. The new indictment, in vivid contrast, alleged that the scheme <u>began</u> in July of 1986 but

continued to and including the date of the filing of the second indictment, over a year later.

Finally, the new indictment contained 38 counts, 14 more than the original indictment. Four of the new securities fraud counts (and corresponding mail fraud counts) arose from splitting into two counts transactions which were stated as one count in the initial indictment.

But five of the new securities fraud counts and five corresponding mail fraud counts were entirely new. They involved purchases of Colt call options and stock on various dates in July by Saul Listokin, Grossman's brother-in-law, a person never even mentioned in the original indictment. Nevertheless, over defendant's claim of

prejudice and inadequate time to prepare a defense, the defendant was forced to trial on the new indictment the following Monday.

At the trial, the government's chief witness was David Lev, the brother of Shimon Lev. David Lev was a convicted perjurer who was out of the country when all of the Colt option purchases were made and who had no contact whatsoever with Petitioner. Nevertheless, over objection, he was permitted to testify about conversations he claimed he had had with his brother Shimon Lev. All of these conversations occurred after July 23, 1986 that is, at a time outside the period described in the original charge but within the extended time frame of the superseding indictment, and all concerned purchases of Colt options by Norman Stein. It was his testimony which purported to establish that Petitioner himself profited from the

securities transactions. Specifically, if both the fact and the substance of David Lev's reported hearsay conversations with his brother Shimon Lev were believed, they showed that Petitioner had tipped Shimon Lev about the Colt recapitalization, that the disclosure was not innocent or inadvertent, and that based on the tip Norman Stein had purchased Colt options for himself and for Shimon Lev. Crucially, David Lev also testified that Shimon Lev had told him that Grossman himself had a financial interest in the securities transactions and that Grossman was paid his share of the proceeds via a check for $25,000 from David Lev (who was then holding Shimon's profits) which he, David Lev, made out in blank and gave to Shimon at Shimon's request.

At the same time, however, the prosecution -- but not the defense -- had Shimon Lev's sworn grand jury testimony in

which, apparently, he had exculpated Israel Grossman and denied Grossman's involvement. The prosecution took the position that its Brady obligation was fully discharged by notifying Grossman that Shimon Lev might have exculpatory information; it refused to turn over his concededly exculpatory grand jury testimony, and the trial court refused to order the prosecution to turn it over.

The remainder of the government's case was entirely circumstantial, tending to establish, through Kramer, Levin witnesses, that Petitioner may have learned about the Colt recapitalization plan through his colleagues at the law firm and, through the law firm's telephone records, that telephone calls were placed from Petitioner's office to his relatives around the time that they were purchasing Colt options. A Kramer, Levin partner testified that the firm had a

confidentialty policy which was important to getting and keeping business and which was designed to insure compliance with the securities laws.

Through employees of brokerage houses and their clearinghouses, the government proved that George Hirschberg, Walter Herzberg, Saul Listokin and Norman Stein purchased out-of-the money call options for Colt stock. There was testimony that, pursuant to their general business practices, the brokerage houses or clearing houses mailed confirmation slips for each purchase to the option purchaser, confirming that a requested purchase order had been executed and stating the price at which the purchase had been made.

The proposed recapitalization plan was approved and, after the announcement of the recapitalization plan, Colt stock rose substantially in value. The Listokin account

had sold its options before the recapitalization announcement, and had lost money on the transactions. The other option purchasers -- Hirschberg, Herzberg and Stein -- made substantial profits on their investments in Colt options.

The government's evidence on the Listokin counts, the new charges which were first mentioned in the superseding indictment, was rather different. As to these transactions, the government purported to have proof of Grossman's direct personal, albeit surreptitious, involvement in the purchase of Colt securities. Based on testimony of a Whitehall Securities' executive that the customer who opened the Listokin account was extremely nervous, that witness's failure to identify Listokin from a photograph, and expert testimony that the signature on the original account documents was not in fact

Listokin's, the government argued that it was Petitioner himself who visited Whitehall Securities and opened the account in Listokin's name. Based on the congruence of Kramer, Levin telephone records and Whitehall Securities' business records which recorded the time of day when purchase orders were executed, the prosecution also claimed that it was Petitioner himself who, by telephone from his office at Kramer, Levin, actually placed the purchase orders for Colt options through that account.

Petitioner's defense was that guilt was not proved beyond a reasonable doubt. By focusing on the circumstantial nature of the proof, and through cross-examination of the government's witnesses, he sought to establish that he had not surreptitiously obtained

information known by him to be confidential and that he had no culpable involvement in the charged purchases of Colt securities.

The jury convicted Petitioner on all counts. He was sentenced to a two year prison term.

The Court of Appeals for the Second Circuit affirmed. The Court rejected Grossman's claim that he should not have been forced to trial two days after the return of a superseding indictment, noting that he had adequate notice -- through discovery and an SEC civil proceeding -- "of the Listokin trades and the government's interest in them" (A-14) and ruling that the "superseding indictment did not alter substantially the government's case against Grossman." (A-15) The Court of Appeals rejected his claim that the confidential information at issue was not property of the type protected by the mail

fraud. (A-16) The Court of Appeals also rejected his claim that he was entitled to have had the exculpatory grand jury testimony of Shimon Lev under Brady v. Maryland, 373 U.S. 83 (1963), and Fed. R. Crim. P. 6(e). (A-15-16) Petitioner preserved for review in this Court his challenge to the validity of the Second Circuit's "misappropriation" theory of securities fraud. (Brief of Defendant-Appellant in the Court of Appeals at 44.)

REASONS FOR GRANTING THE WRIT

POINT I

DUE PROCESS IS VIOLATED AND THE ENDS OF JUSTICE ARE ILL-SERVED WHERE A DEFENDANT IS GIVEN ONLY TWO DAYS' TIME TO PREPARE A DEFENSE TO A SUPERSEDING INDICTMENT WHICH, AMONG OTHER CHANGES, ADDED TEN ENTIRELY NEW COUNTS AND DRASTICALLY CHANGED THE NATURE AND THE SCOPE OF THE CASE AGAINST WHICH HE WAS CALLED UPON TO DEFEND

In United States v. Rojas-Contreras, 474 U.S. 231 (1985), this Court held that the Speedy Trial Act of 1974, 18 U.S.C. §3161 et seq., does not prohibit commencement of a trial less than 30 days after the defendant's arraignment on a superseding indictment. The Court left to the trial court's discretion the power to grant a continuance where the return of a superseding indictment necessitates further defense preparation. Justice Burger, writing for the Court, predicted that:

> The authority of the District Court to grant an "ends of justice" continuance should

> take care of any case in which the Government seeks a superseding indictment which operates to prejudice a defendant.

106 S.Ct. at 558. Justices Blackmun and Brennan, concurring, were more specific about when trial court's must recognize a defendant's right to defense preparation time following the return of a superseding indictment. They noted that not every superseding indictment burdens a defendant for "[f]requently, a superseding indictment is used to drop charges or parties or, as here, to make a minor correction leaving the charges and the evidence necessary to defend against them unaffected." Id. at 560. But, they recognized, some superseding indictments do "add to a defendant's burden in preparing for trial." Id.

> In the event of additional charges, a defendant may well need additional preparation time. The Constitutional right to assistance of counsel is

> rendered meaningless if a defendant is forced to trial in the absence of adequate time to prepare. To avoid prejudicing a defendant, a continuance should be granted when there is a meaningful possibility that a superseding indictment will require an alteration or adjustment in the planned defense. Trial courts should bear in mind that counsel may require time fully to analyze the impact of the superseding indictment, and to explore any options it presents or precludes.

Id., footnote omitted.

As this case demonstrates, the advice of Justices Blackmun and Brennan has gone unheeded and Justice Burger's prognostication that the availability of an ends-of-justice continuance "should take care of any case" in which a superseding indictment ... prejudice[s] a defendant" has gone unrealized. Rather, in this case the Second Circuit has adopted a rule which turns this Court's assumptions on their head. Under the Second

Circuit's rule a defendant is not entitled to any defense preparation time following the return of a superseding indictment -- even one which adds numerous new charges and reflects massive changes in the government's case -- unless the defendant can demonstrate actual prejudice. And, according to the Second Circuit, a defendant cannot demonstrate such prejudice if he had notice -- through any source -- of the government's "interest" in the facts underlying the new charges and/or if the evidence introduced to prove the charges in the superseding indictment might have been introduced at a trial on the original indictment.

Under the Second Circuit's ruling, the defendant's need to prepare a defense to new charges or to explore options the new indictment presents or precludes is, entirely irrelevant.

The rule announced in this case by the Second Circuit, a major departure from the rule previously applied in that Circuit, can only work great mischief in the administration of justice in the federal courts. By placing a burden on the defendant to demonstrate specific prejudice as a result of trial without defense preparation time, it renders meaningless the defendant's Sixth Amendment rights to counsel and to present a defense. And it directly compromises the integrity of the fact-finding process.

In complex federal criminal prosecutions, superseding indictments are no longer the exception, but the rule. Given the demands inherent in heavy federal court caseloads and those exerted by the Speedy Trial Act on the calendars of the federal district court judges, there are tremendous pressures to keep

a previously set criminal trial date firm; a continuance can wreak havoc on a district judge's tightly scheduled calendar.

As this case demonstrates, it is apparent that a body of rules must be developed which will give clear guidance to both federal prosecutors and district judges as to when additional preparation time must be granted following return of a superseding indictment or when, alternatively, the prosecution must rest content with prosecuting the defendant on only those charges set forth in the original indictment. Indeed, a per se rule mandating a minimum of 30 days' preparation time upon the defendant's request whenever a superseding indictment adds new criminal charges may be appropriate. But per se rule or not, in this case, the Constitution was violated, and the proceeding was unfair where the defendant was forced to trial without any significant time

to prepare a defense to ten new counts, added at the last minute. Because, on these new counts, the prosecution claimed that Petitioner personally made securities purchases, it is patent that their addition not only required him to prepare a defense as to these specific charges, but also compelled him to adjust his overall defense to take the government's evidence into account. At the very least, in light of the fact that the five new mail fraud charges were based on a mailing by a different brother, it was crucial that the defense have a chance to investigate the office procedures and mailing practices of that broker.

The ten new counts added by the superseding indictment were, in quite another respect, not merely more of the same. It is no exaggeration to say that they massively shifted the focus of the government's case.

It was the prosecution's contention, based on a witness's failure one year later to identify Saul Listokin as the person who opened the trading account bearing his name, and an opinion that the signature on the original account-opening papers was not really Listokin's, that it was Petitioner himself, who opened the Whitehall account, masquerading as Listokin and signing Listokin's name to the account documents. It was further the government's contention -- and, an extraordinarily damaging one since it linked the Petitioner directly to the purchase of the Colt options -- that, during telephone calls placed from his office to Whitehall Securities, it was Petitioner himself who placed orders for the purchase of Colt options in Listokin's name.

As the prosecutor implicitly recognized when he told the trial judge that he "needed" the superseding indictment, none of this extremely damaging evidence would have been admissible in the case had the government gone to trial on the original indictment. And, if it was to be admitted at Petitioner's trial, simple fairness and the requirements of due process demanded that Petitioner be accorded an opportunity to prepare a defense to it. For example, the suggestion that it was not Listokin, but Petitioner himself who opened the trading account made it critical for Petitioner to demonstrate who it was, if not Listokin, who opened the account. The introduction of the Listokin transactions also made it extremely important to challenge the validity or reliability of the Kramer, Levin telephone records insofar as they purported to record or reflect the time of day telephone

calls were made. This was a subject which was completely irrelevant with respect to all of the non-Listokin, non-Whitehall telephone calls but it was absolutely critical to the validity of the inference that orders for Colt securities in the Listokin account were placed by telephone calls made from Grossman's office at Kramer Levin.

The district judge apparently concluded that Grossman had adequate warning because he was aware that the government was interested in the Listokin transaction; they were a part of the SEC's allegations against Petitioner and others in a civil suit. The Second Circuit endorsed this reasoning. It ruled that Petitioner could show no prejudice (notwithstanding his conviction on ten felony counts based wholly on the Listokin trades) since he had notice -- via pretrial discovery and the civil proceeding -- "of the Listokin

trades and the government's interest in them." (A-14) But a civil suit cannot give a defendant notice of criminal charges sufficient to satisfy due process. Under our Constitution it is the indictment which most apprise the defendant of what he must bebe prepared to meet Russell v. United States, 369 U.S. 749, 763 (1962). Knowledge of the government's "interest" in a particular set of facts is not the equivalent of notice to a defendant that he will be compelled to defendant against charges based on those facts in a criminal proceeding.

Likewise, the superseding indictment's expansion of the time frame and its allegation, for the first time, that Petitioner had personally profited from the alleged scheme were changes which were substantial and which, by their nature, necessitated consideration of changes in

defense strategy. Plainly, the changes in the indictment were sought by the prosecution to reflect both a change in the prosecution's theory of the case, and a major shift in its evidence and trial strategy. By expanding the time frame and introducing the allegation that Grossman had himself profited from this scheme, the superseding indictment provided the framework for a far more complex set of charges against the Petitioner than did the original charge. Furthermore, in laying out that framework, it provided the vehicle through which the government was able to introduce, mostly through highly suspect "co-conspirator hearsay" testimony, a great deal of damaging, through highly dubious, evidence. Specifically, the prosecution was able to present to the jury David Lev's report of his co-conspirator conversations with Shimon Lev about Grossman's involvement.

The Second Circuit framed the issue as whether Petitioner was prejudiced by the superseding indictment. The Court concluded that he was not on the ground that the same evidence could have been admitted even at a trial on the original indictment. But, Petitioner maintains, that test of prejudice is not the proper standard, as the Second Circuit formerly recognized in United States v. Guzman, 754 F.2d 482 (2d Cir. 1985), cert. denied, 106 S.Ct. 758 (1986), a rule it has now inexplicably repudiated.

In that case, the defendant complained on appeal that he had been forced to stand trial one day after the filing of a superseding indictment which expanded the scope of the charged narcotics conspiracy from a time period of two days to one of almost two years. The government's argument was that Guzman was not prejudiced because the same evidence could

have been presented at a trial on the original indictment. The Second Circuit rejected the government's argument and reversed Guzman's conspiracy conviction:

> By focusing on the prosecution's case and the fact that the evidence introduced at trial on the superseding indictment was the same as that which the government had expected to use at the first trial, the district court neglected to take into account the impact that the second indictment might have had on defense theories of the case, and the defendant's need for a more extended preparation.

754 F.2d at 486. The Second Circuit has now adopted a rule which, notwithstanding Rojas-Contraras, neglects to take into account the impact the superseding indictment might have on defense theories of the case and the defendant's need for further preparation.

This Court has cautioned that "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the

right to defend with counsel an empty formality." Ungar v. Sarafite, 376 U.S. 575, 589 (1964). Ironically, in this case, expeditious disposition of criminal charges was not even an issue. The defense was ready, willing and able to go to trial, as scheduled on the original indictment, as planned. It was the prosecution's unilateral decision to add a host of new charges at the last conceivable moment and the trial court's acceptance of this maneuver which gave rise to the problem.

In our adversary system, surprise claims, like surprise witnesses, are not favored. As this Court recently stated in Taylor v. Illinois, 108 S.Ct. 646, 653 (1988), the adversary process can only function fairly and effectively if "each party [has] a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case."

The last-minute return of a superseding indictment which makes substantial change in the original charge, as this superseding instrument most certainly did, and the insistence that the defendant defend the new charges without a reasonable period of time to prepare a defense subverts the policies reflected in the Speedy Trial Act and, Petitioner contends, offends the Fifth and Sixth Amendments.

This case presents a question of substantial importance to prosecutors deciding whether or not to seek a superseding indictment, federal district judges who must make important and difficult scheduling decisions when superseding indictments are returned, and defendants, like Petitioner here, whose Constitutional rights to adequate notice of the charges against them and an

opportunity to plan and present their defenses are directly affected by those decisions. For these reasons, certiorari should be granted.

POINT II

CRIMINAL SANCTIONS MAY NOT BE IMPOSED UPON AN ATTORNEY, UNDER SECTION 10(b) AND RULE 10b-5, FOR "MISAPPROPRIATING" INFORMATION FROM HIS LAW FIRM AND ITS CLIENT, WHERE THE LAW FIRM AND THE CLIENT -- NEITHER OF WHICH PURCHASED SECURITIES FROM NOR SOLD SECURITIES TO PETITIONER -- ARE THE ALLEGED VICTIMS OF THE FRAUD

Certiorari should be granted in the instant petition to resolve an issue of extraordinary importance regarding the application and reach of the federal securities laws. Petitioner Israel Grossman was prosecuted and convicted on a theory of securities fraud which has divided this Court and which extends the reach of the federal securities statute well beyond that which either the statute or the decisions of this Court will permit. The Petitioner was convicted under a theory that misappropriation of confidential information by a fiduciary for

use in trading securities, regardless of who the seller or purchaser of securities is, violates Section 10(b) and Rule 10b-5. Indeed, the jury was instructed that, independent of any sale or purchase of securities, it would be sufficient to convict Petitioner under the securities laws if the jury found an "actual or potential injury ... to the reputation of the law firm." Tr. at 1369.

Fifty years of jurisprudence have established that the purpose of Section 10b and Rule 10b-5 is to protect public investors, not the reputation of a law firm.[1] The

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[1]As one observer recently noted:

> The Supreme Court and lower federal and state courts have consistently held that a major aim of securities legislation is to protect the investing public from unfair manipulation of the securities markets. Civil and criminal cases brought under Rule 10b-5

(footnote continued)

securities laws are designed to protect market participants against securities fraud; they are neither designed, nor drafted, to protect anyone against any kind of fraud, so long as there is some later contact -- however remote and unrelated -- with a securities trade. Petitioner did not defraud or injure any member of the investing public in connection

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likewise emphasize the protection of investors as one of the primary functions of the rule and section 10(b). Because the misappropriation theory relies on the damage done to employers rather than to investors, Rule 10b-5 has been improperly utilized as a vehicle to protect the reputations of employers. An employee's fraudulent breach of the duty of confidentiality constitutes a fraud against the employer, not against investors in the market.

Insider Trading and the Misappropriation Theory: Has the Second Circuit Gone Too Far?, 61 St. John's L. Rev., 78, 108 (1986).

with its purchase or sale of securities, his conduct did not fall within the prohibitions of the federal securities statutes.

"The starting point in every case involving construction of a statute is the language [of the statute] itself." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976), quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring). This Court has noted that the Securities and Exchange Act of 1934 "cannot be read 'more broadly than its language and the statutory scheme reasonably permit.'" Chiarella v. United States, 445 U.S. 222, 234 (1980) (citations omitted). The 1934 Act provides the statutory basis for prescriptions of insider trading. Section 10(b) of the 1934 Act make it unlawful for "any person, directly ... to use or employ, in connection with the purchase or sale of any

security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations" as the SEC may prescribe. Rule 10b-5, in turn, prohibits "any person" from engaging in "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

"Manipulation" is "virtually a term of art when used in connection with securities markets." Hochfelder, supra, 425 U.S. at 199, in Santa Fe Industries v. Green, 430 U.S. 462, 476 (1977), the Court noted that the term generally refers "to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." There can be little question that the term, as

applied in the statute, refers to the manipulating of investors. As this Court observed in Santa Fe:

> Section 10(b)'s general prohibition of practices deemed by the SEC to be "manipulative" -- in this technical sense of artificially affecting market activity in order to mislead investors -- is fully consistent with the fundamental purpose of the 1934 Act 'to substitute a philosophy of full disclosure for the philosophy of caveat emptor ....'

430 U.S. at 476-77 (quoting Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972)).

The legislative history indicates that Rule 10(b) was promulgated "specifically to close 'a loophole in the protection against fraud ... by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase." Note, Insider Trading and the Misappropriation Theory: Has the Second Circuit Gone Too Far?,

61 St. Johns L. Rev. 78, 88 (1986) (hereafter Insider Trading and the Misappropriation Theory), quoting SEC Securities Exchange Act Release No. 3230 (May 21, 1942)) (emphasis added). The rule, modeled after section 17(a) of the Securities Act of 1933,[2] was broadened to encompass manipulation in the sale of securities as well. Id.

This Court has faithfully limited the application of Rule 10b to those activities clearly proscribed by this regulation -- limiting the applicability to Rule 10b-5 to fraudulent nondisclosure. Through the 1960's

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[2]See SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 867 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969):

> Although the authority for the Rule comes from section 10(b) of the Securities and Exchange Act of 1934, the draftsmen turned their backs on that section and borrowed the words of section 17 of the Securities Act of 1933, simply broadening these to include frauds on the seller as well as the buyer.

and 1970's, without support in either legislative history or statutory language, circuit courts attempted to expand the "list of insiders and transactions covered by [the Rule] and [relax] common law requirements for fraudulent nondisclosure while emphasizing the goal of achieving fairness and equal access to information for all investors in the securities markets." Insider Trading and the Misappropriation Theory at 93.[3] In response,

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[3]Not all circuit courts ignored the significance of the requirement that the injured party be an investor. As then-Circuit Judge Stevens observed in Eason v. General Motors Acceptance Corp.:

> The emphasis on the injured party's status as an investor indicates that the protection of the rule extends to persons who, in their capacity as investors, suffer significant injury as a direct consequence of fraud in connection with a securities transaction, even though their participation in the transaction did not involve either the purchase or the sale of a security.

(footnote continued)

this Court issued a series of decisions consistently holding that trading securities on the basis of undisclosed information is fraud under section 10(b) and Rule 10b-5 only where the trader owes a duty of disclosure of a market participant.

In United States v. Chiarella, 588 F.2d 1358 (2d Cir. 1978), rev'd, 445 U.S. 222 (1980), for instance, the Second Circuit had affirmed the conviction of a mark-up man, employed by a printer, who had discovered the names of companies targeted for tender offers by the printer's corporate employer and subsequently traded in these companies' stocks. The Circuit Court held that "[a]nyone -- corporate insider or not -- who regularly receives material corporate information may

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490 F.2d 654, 659 (7th Cir. 1973), cert. denied, 416 U.S. 960 (1974).

not use that information ... without incurring an affirmative duty to disclose." 588 F.2d at 1365 (emphasis in original).

In considering the substantive reach of Rule 10b-5 for the first time, this Court reversed the Second Circuit's Chiarella decision, and held that mere possession of material nonpublic information did not impose an obligation to disclose or a duty to refrain from trading. 445 U.S. at 235. Rather, the Court held that silence accompanying trading does not constitute fraud under the securities laws unless there exists "a duty to disclose arising from a relationship of trust and confidence between the parties to a transaction." Id. at 230. This Court concluded that it could not affirm the petitioner's conviction without recognizing a "general duty" between all participants in market transactions to forgo actions based on

material, nonpublic information," 445 U.S. at 233 -- recognition which the Court would not undertake absent explicit evidence of congressional intent. Id.[4]

Similarly, in 1983, the Supreme Court addressed the issue of "tippee liability," and the holding of Chiarella was extended to cover the tippees of insiders. In Dirks v. SEC, 463 U.S. 646, 654 (1983), this Court noted that "[n]ot 'all breaches of fiduciary duty in connection with a securities transaction' come within the ambit of Rule 10b-5." Id. (quoting Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 472 (1977)).[5]

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[4]This Court, in Chiarella, specifically refused to rule on the merit of the misappropriation theory as an alternative basis for affirmance, holding that such a theory of conviction had not been submitted to the jury. 445 U.S. at 236.

[5]Indeed, this Court wrote that "in a statutory area of the law such as securities regulation, where legal principles of general application

(footnote continued)

A tippee may assume a fiduciary duty to shareholders of a corporation not to trade on material nonpublic information "only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." Id., 463 U.S. at 660. Moreover, the Court observed that "a violation [of section 10(b)] may be found only where there is "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.'" Dirks v. SEC, 462 U.S. 646, 663 n. 23 (1983) (quoting Hochfelder, 425 U.S. at 199).

Petitioner was convicted of securities fraud under a theory -- the misappropriation theory -- which departs from the dictates of

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must be applied ... behavior that may fall below ethical standards of conduct" is not always illegal. 463 U.S. at 661, n. 21.

Chiarella and Dirks, and which evenly split this Court in its most recent analysis of the issue.[6] This theory was first advanced in United States v. Newman, 664 F.2d 12 (2d Cir. 1981), cert. denied, 464 U.S. 863 (1983), where the government alleged that employees of two investment houses had breached the trust and confidence of their employers, and violated Rule 10b-5, by misappropriating confidential information of corporate clients, and trading on this information. The Second Circuit reversed the district court's dismissal of the complaint, holding that the defendants' "conduct ... could be found to constitute a criminal violation of Section 10(b) and Rule 10b-5 ...." Newman, 664 F.2d at 16. Three years later, in SEC. v. Materia, 745 F.2d 197 (1984), a copyreader employed by a financial printer, was convicted of

[6]See Carpenter v. United States, 108 S.Ct. 316 (1987).

securities fraud for trading on information divined from confidential information entrusted to his employer. 745 F.2d at 202. Most recently, in United States v. Carpenter, 791 F.2d 1024 (2d Cir. 1986), aff'd in part, aff'd by an equally divided court in part, 108 S.Ct. 316 (1987), a divided Court affirmed the conviction of a Wall Street Journal reporter who had revealed the prepublication schedule and contents of a Journal article to a broker-dealer, who in turn traded on this information and shared the profits with the reporter. In sum, in Carpenter the Second Circuit wrote:

> Thus, because of his duty of confidentiality to the Journal, defendant Winans -- and Felis and Carpenter, who knowingly participated with him -- had a corollary duty which they breached, under section 10(b) and Rule 10b-5, to abstain from trading in securities on the basis of the misappropriated

> information or to do so only upon making adequate disclosure to those with whom they traded.

791 F.2d at 1034.[7]

The misappropriation theory, as announced in Newman, Materia, and Carpenter, and applied in the present case, departs from Supreme Court precedent in two fundamental ways. First, it "presupposes that the misappropriation of market-sensitive information from an employer, combined with subsequent trading in the securities market on the basis of the information, satisfies the requirements for Rule 10b-5 liability, regardless of whether any fiduciary relationship exists between the misappropriator and a market participant."

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[7]In dissent, Judge Miner noted that "[w]hile the proscription of fraudulent and deceptive practices in connection with the purchase and sale of securities is a broad one, it never was intended to protect the reputation or enforce the ethical standards of a financial newspaper." 791 F.2d at 1037 (Miner, J., dissenting).

Insider Trading and the Misappropriation Theory, supra, at 102. Moreover, the theory imposes a general duty to disclose or abstain from trading, a duty which was specifically rejected by the Supreme Court in its Chiarella decision.[8]

Similarly, the theory, as applied in the instant case, turns the Supreme Court's decision in Dirks on its head.

> Under Dirks, a tippee's liability for trading on the basis of material nonpublic information is dependent on his having received the information from a tipper who breached a fiduciary duty by revealing the information for personal gain. Utilizing the misappropriation theory to impose liability upon tippees ignores the personal gain requirement since the insider, whether it be an investment banking firm or a

[8]"We know of no rule of law ... that a purchaser of stock, who was not an 'insider' and had no fiduciary relationship to a prospective seller, had any obligation to reveal circumstances that might raise a seller's demands and thus abort the sale." Chiarella, 445 U.S. at 232, n. 14 (citations omitted).

> financial newspaper, has no motive of personal gain in revealing the information.

Insider Trading and the Misappropriation Theory, supra, at 105-06.

There was never any allegation, in the instant case, that that alleged "tipper" -- whether it be Petitioner's law firm or its client -- benefited, or had a motive to benefit, from the "tip," as required in Dirks. Dirks, 463 U.S. at 662-64. As one observer has noted, "such an expansive application of Rule 10b-5 fails to provide adequate notice as to which trading activities violate securities laws." Insider Trading and the Misappropriation Theory, supra, at 106.

This case presents an opportunity to resolve the incontrovertibly important issue left open by this Court's split decision in Carpenter. The writ of certiorari should therfore be granted.

POINT III

CONFIDENTIAL INFORMATION ABOUT A CORPORATION'S PROPOSED RECAPITALIZATION ENTRUSTED TO A LAW FIRM BY A CLIENT FOR THE LIMITED PURPOSE OF ALLOWING THE FIRM TO RENDER LEGAL ADVICE IS NOT "PROPERTY" OF THE LAW FIRM OR CLIENT WITHIN THE MEANING OF THE MAIL FRAUD STATUTE WHERE THE WAS NOT INFORMATION GATHERED OR DEVELOPED BY THE CLIENT OR THE LAW FIRM, WHERE NEITHER THE CLIENT NOR THE LAW FIRM HAD THE RIGHT TO USE THE INFORMATION FOR ANY COMMERCIAL PURPOSE, AND WHERE THE ONLY HARM WHICH MIGHT ARISE FROM MISAPPROPRIATION OF THE INFORMATION WAS INJURY TO THE LAW FIRM'S REPUTATION

In McNally v. United States, 107 S.Ct. 2875 (1987), this Court held that the mail fraud statute, 18 U.S.C. §1341, protects only property rights, not intangible rights such as the right of citizens to have their state's affairs conducted honestly. In Carpenter v. United States, 108 S.Ct. 316 (1987), the Court

held that, while McNally removed intangible rights from the scope of the mail fraud statute, intangible property rights were still within the statute's scope. Specifically, the Court held that confidential business or commercial information -- in that case, the publication schedule and contents of the Wall Street Journal's "Heard on the Street Column" -- though intangible, was nevertheless property protected by the federal mail fraud law.

The question which this case presents is which intangible rights are "property" interests (and thus within the statute's protection) and which intangible rights are "non-property" interests outside its scope. A host of recent decisions demonstrates that this question, irrelevant before McNally and Carpenter but crucial in the aftermath of those two decisions, demands an answer from

this Court. The decisions of the lower courts are increasingly in disarray, and federal law has become unacceptably uncertain. See, e.g., United States v. Runnels, 833 F.2d 1183 (6th Cir. 1987) (union official's failure to turn over a bribe to the union was a property deprivation under McNally); United States v. Richerson, 833 F.2d 1147 (5th Cir. 1987) (employee's concealment of material information from his employer causes property harm because the employer does not receive the property for which he paid); United States v. Ochs, 842 F.2d 515 (1st Cir. 1988) (disapproving Richerson and Runnels); United States v. Murphy, 836 F.2d 248 (6th Cir. 1988) (state's right to control or object with respect to issuances of a bingo permit does not constitute property right of the state, although, once issued, permit would be property of holder); United States v.

Baldinger, 838 F.2d 176 (6th Cir. 1988) (right to conduct business free of false information concerning status of associate's polygraph license not a property interest); United States v. Evans, 844 F.2d 36 (2d Cir. 1988) (right to control future arms sales is not a property right).

This case involves confidential information developed by Colt Industries, Inc. but divulged to its Pension Plan and, by the Plan, to the Plan's lawyers for the sole and exclusive purpose of allowing the Plan to obtain legal advice. The precise question which this case presents is whether such information is "property" of the Pension Plan or of the law firm so that its misappropriation constitutes interference with a property right even though the misappropriation in no way interferes with the client's or law firm's ability to use the

information for the purpose for which it was entrusted to them and even though the only harm alleged or shown is potential injury to the law firm's reputation because of its inability to keep confidential information confidential.

In this case, the Court of Appeals, relying on Carpenter, essentially held that all business-related information is the property of its holder, regardless of the nature of the information, the circumstance under which the holder obtained it, or the nature or scope of the holder's right to exploit it. In so doing, it ignored every one of those factors which led this Court to conclude that the information at issue in Carpenter, though intangible, was "property" of the Wall Street Journal: the fact that the information was the stock in trade of the paper, gathered at the cost of enterprise,

organizations, skill, labor and money to be sold to others, like any other merchandise, and the fact that the misappropriation interfered with the Journal's right to exclusive use of the information.

Petitioner contends that whatever "interest" Kramer, Levin had in the confidential information entrusted to it was not a property interest which Petitioner violated. What may have been violated was its non-property interest (i.e., its desire) to keep the information confidential. This interest or desire was a function of its ethical responsibilities and of its desire to protect its reputation. Under this Court's decisions, however, neither one's interest in one's reputation, Paul v. Davis, 424 U.S. 693, 712 (1976), nor an interest in an employee's faithful service, see McNally v. United States, supra, is a property interest

protected by the mail fraud statute. (Nor, even if it were, is it the "interest" Petitioner is alleged to have misappropriated.)

As the reported cases show, schemes to defraud may assume almost an infinite variety of forms and the types of interests such schemes can affect are equally varied. This Court's decisions in Carpenter and McNally have rendered it essential to differentiate between "property" interests and "non-property" interests in a context where those concepts were never before relevant. While common law definitions may help elucidate the meaning of "property" under McNally, legal definitions developed for one purpose cannot always be used for another. The lower courts will therefore continue to confront this question, and will continue to reach

disparate, irreconcilable conclusions. The uncertainty to which Carpenter and McNally have given rise is unacceptable.

The petition for a writ of certiorari should be granted.

POINT IV

A DEFENDANT IS ENTITLED TO ACCESS TO ADMITTEDLY EXCULPATORY GRAND JURY TESTIMONY OF AN ALLEGED CO-CONSPIRATOR WHO DOES NOT TESTIFY AT TRIAL BUT WHOSE HEARSAY STATEMENTS INCULPATING THE DEFENDANT ARE INTRODUCED THROUGH ANOTHER WITNESS

This case presents the important question whether the rule of Brady v. Maryland, 373 U.S. 83 (1963), is violated where the prosecutor possesses, but refuses to disclose, transcripts of exculpatory grand jury testimony merely because the defendant has been advised that the testimony was exculpatory and can speak to the grand jury witness about his testimony. Relying on a line of Second Circuit cases holding that Brady does not require the government to hand over exculpatory evidence "if the defendant knew or should have known the essential facts permitting him to take advantage of any

exculpatory testimony," the Court of Appeals rejected Petitioner's claim that he was entitled to the transcripts. (A-15)

Petitioner was convicted largely on co-conspirator hearsay evidence presented through the testimony of David Lev, himself a convicted perjurer, who testified about conversations he allegedly had with his mentally unbalanced brother, Shimon Lev, who was not called to testify for the prosecution. According to David Lev, in those conversations Shimon Lev inculpated Petitioner. At the same time the government (but not the jury) well knew that, in sworn grand jury testimony given under a grant of immunity, Shimon Lev had contradicted David Lev's claims and had exculpated Petitioner.

This Court has indicated that one reason why the admission of co-conspirator hearsay does not violate defendant's rights is that

Rule 806 of the Federal Rules of Evidence permits a defendant to impeach the hearsay declarations of alleged co-conspirators. Bourjaily v. United States, 107 S.Ct. 2775, 2781 (1987). If the guarantee is to be meaningful, the Brady rule must extend to sworn grand jury testimony of the alleged co-conspirators which directly contradicts his hearsay statements.

Certiorari should be granted to consider this important question.

CONCLUSION

For the above-stated reaons, the writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 5, 1988
New York, New York

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 777—August Term, 1987

(Argued February 19, 1988 Decided March 25, 1988)

Docket No. 87-1419

UNITED STATES OF AMERICA,

Appellee,

—v.—

ISRAEL G. GROSSMAN,

Appellant.

Before:

TIMBERS, KEARSE and MAHONEY,

Circuit Judges

Appeal from a judgment entered September 15, 1987 in the Southern District of New York, Richard Owen, *District Judge*, convicting appellant on nineteen counts of securities fraud and nineteen counts of mail fraud.

Affirmed.

ALAN M. DERSHOWITZ, Cambridge, Mass. (Mark D. Cahn, Victoria B. Eiger, Nathan Z. Dershowitz, and Dershowitz & Eiger, New York, N.Y., on the brief), *for appellant*.

ROBERT GAGE, Assistant United States Attorney, New York, N.Y. (Rudolph W. Giuliani, United States Attorney, Celia Goldwag Barenholtz and John F. Savarese, Assistant United States Attorneys, New York, N.Y., on the brief), *for appellee*.

TIMBERS, *Circuit Judge*:

Appellant Israel G. Grossman appeals from a judgment entered September 15, 1987 in the Southern District of New York, upon a jury verdict, Richard Owen, *District Judge*, convicting appellant on (1) nineteen counts of securities fraud, in violation of 15 U.S.C. §§ 78j(b) (1982), 78ff (1982 & Supp. IV 1986) and 17 C.F.R. § 240.10b-5 (1987); and (2) nineteen counts of mail fraud, in violation of 18 U.S.C. §§ 2 and 1341 (1982).

On appeal, Grossman claims principally that he was not given enough time to prepare for trial on a superseding indictment which was returned two business days before trial; and that he should have been given allegedly exculpatory grand jury testimony. Other subordinate claims are raised.

We hold that the district court did not abuse its discretion in denying Grossman's motion to dismiss the super-

seding indictment or in failing to grant a continuance to prepare for trial on the superseding indictment. We also hold that the government was not obliged to provide Grossman with the grand jury testimony.

We affirm.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

At the time of the events in question, Grossman was an associate in the Manhattan law firm of Kramer, Levin, Nessen, Kamen & Frankel ("Kramer Levin" or "the firm"). He became associated with Kramer Levin in October 1984 and worked in its pension department which consisted of two partners and five associates.

On July 9, 1986, attorneys in the pension department of Kramer Levin were retained by the trustees of a pension plan known as the Retirement Savings Plan for Salaried Employees (the "Plan"), of Colt Industries, Inc. ("Colt"). The Plan retained Kramer Levin to represent it in connection with a proposed recapitalization of Colt scheduled for July 20, 1986. Under the recapitalization, each Colt shareholder except the Plan would redeem their common stock in exchange for a cash payment of $85 per share and one share in the recapitalized company. A share in the recapitalized company was expected to have a value of $15. The Plan, which held about seven percent of Colt's stock, would receive no cash but instead would receive an equivalent number of shares in the recapitalized company. Public announcement of the proposed recapitalization was expected to cause Colt's stock to rise dramatically.

Starting on July 9, 1986 and continuing until the recapitalization was announced, Kramer Levin attempted to keep information of the recapitalization confidential. On drafts of documents and in correspondence, it used a code name for the matter or omitted the client's name and dollar amounts. It established the policy of not letting others in the firm know of the matter except on a "need-to-know" basis.

Kramer Levin also periodically circulated to its attorneys a general memorandum on its confidentiality policy. This memorandum stated that attorneys receiving information from clients could not use that information for trading and could not give it to anyone else for any purpose. Kramer Levin circulated this confidentiality memorandum several times while Grossman was an associate. The last time the firm circulated the memorandum prior to the Colt transaction was November 1, 1985.

On July 10, 1986 (the day after the Plan retained Kramer Levin), Michael Nassau, the senior partner in the pension department, met with several attorneys in the department (not including Grossman), and briefed them on the Colt recapitalization. Martin Fleischer was one of the associates at the meeting.

That same evening, Grossman went to Fleischer's office and asked him if he was working on the new transaction Grossman had been hearing about. Fleischer said he was. In response to further questions from Grossman, Fleischer told him almost everything about the recapitalization, including the estimated value of the new shares; the amount of cash per share to be given to the shareholders; and the identity of "the others involved". At trial, Fleischer was unsure whether he divulged to Grossman the name of the client; he testified that he did not recall his response when

Grossman asked him the client's name. Fleischer also testified that Grossman had visited him only five other times in the year and a half they had worked together.

The events that occurred subsequent to the meeting between Fleischer and Grossman are in dispute. Substantial circumstantial evidence, however, in particular Kramer Levin's telephone records, indicates that, starting with that same evening of July 10, 1986, Grossman (or someone using his office phone) began placing numerous phone calls to Grossman's friends and relatives (the "relatives", collectively). Fifty calls were made between July 10, and July 16, 1986. Grossman made 20 calls to his uncle, George Hirshberg; 7 calls to his cousin, Walter Herzberg; 5 calls to another cousin's husband, Shimon Lev; 3 calls to Shimon Lev's friend and business partner, Norman Stein; 3 calls to Grossman's brother-in-law, Saul Listokin; and 12 calls to Listokin & Sons ("L & S"), Listokin's company.

Also starting on July 10, someone frequently called from Grossman's office two discount brokerage firms, Whitehall Securities ("Whitehall") and Datek Securities ("Datek"). Grossman had no accounts at these firms, but Listokin and Stein did. These calls, 14 in all, frequently were made before or after calls to L & S or Stein. Moreover, the person in Grossman's office made calls that coincided precisely with the placement of orders to purchase Colt call options. Peter Gamby was the president of Whitehall and the person who received the calls from Grossman's office. He testified that, upon receiving phone orders, it was his practice (1) to put an investor on hold and time-stamp the order; (2) to execute the order and time-stamp it again; and (3) to take the investor off hold to confirm that the order had been placed. Telephone records

and Gamby's time-stamps indicated that Whitehall placed the orders during the exact times when it was receiving calls from Grossman's office.

During the periods immediately preceding and following the July 10-16 period, Grossman placed no phone calls to any of these tippees or brokerage firms, except for 3 calls to Saul Listokin and 16 to L & S.

All of the relatives made massive purchases of Colt "out-of-the-money" call options over the next few days—i.e., between July 11 and July 18, 1986.[1] For example, they purchased over 80% of "August 80" options (options expiring in August and with a strike price of $80)—the most speculative category of option. None of the relatives had purchased Colt securities before, and none sought advice from their brokers regarding their purchases.

The government asserts that Grossman made the purchases for Listokin, both over the phone and once in person at Whitehall. While the evidence is inconclusive, it does show that on July 14, 1986 someone identifying himself as Listokin entered Whitehall and met with Gamby, its president. He purchased options for the benefit of Saul Listokin, and signed the necessary forms. Someone identifying himself as Listokin telephoned Gamby later to change the name of the beneficiary. Gamby sent new forms to Listokin's address, and received them back signed after a few days. Handwriting analysis showed the signature on the second set of forms was Listokin's but the

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1 An "out-of-the-money" call option allows a person purchasing the option to buy stock during a limited period in the future at a fixed price (the "strike price"). That price is higher than the current market price. Thus, the option holder essentially is betting that the market price will rise over the strike price within the limited time period. The time limitations make such investments extremely speculative.

signature on the first set was not. Neither the government nor Grossman used the results of the comparison of Grossman's handwriting with the signature on the first set of forms. Upon reviewing a set of photographs, including Listokin's but not Grossman's, Gamby was certain that his July 14 visitor was not among them. Moreover, upon being shown a second set of photographs, including Grossman's, Gamby said two of them (one of Grossman) resembled his visitor. Neither the government nor Grossman used this evidence at trial.

On July 20, 1986, Colt made its recapitalization public and, as expected, its share price increased dramatically. On July 18, 1986, before the announcement, the price was $66.75 per share; on July 20, 1986, the price reached $93.62 per share. Thus, on a total investment of $33,000, the relatives were able to realize a total profit of $1,470,000. The Listokin purchases were sold at a loss on July 17 and 18, before the recapitalization was announced. Purchases for Hirschberg, however, more than covered this loss.

The events following the announcement of the recapitalization were proved at trial primarily through the testimony of David Lev, Shimon Lev's brother. David testified about several conversations between Shimon and himself and between Norman Stein and himself. According to David's testimony, Shimon told David that he had "made it big" by purchasing options on a tip from his "cousin Grossman". Shimon told David that he had become concerned about an investigation into his trading in Colt and that he wanted David to become the nominal owner of his call options (which had been purchased through Datek by Stein for Shimon's benefit). David had been in Israel between July 3 and July 23, 1986. Shimon therefore believed

that David had an alibi for the time period when he could have received tips or made purchases. David agreed to become the nominal owner of Shimon's call options. Accordingly, in August 1986, Stein transferred cash from his Datek account to David's bank account. Moreover, Stein drew two checks on the proceeds of the Colt options and gave the checks to David who deposited them in his account.

Shimon subsequently told David that he owed Grossman $45,000 or $56,000 as Grossman's share of the Colt transaction. Shimon said that Grossman would accept $25,000 as his share in recognition of the fact that David would have to pay taxes on the capital gains. David gave Shimon a check for $25,000 with the payee left blank. Shimon, apparently in an attempt to launder the payment, made the check payable to Bnos Rochel, a charity from which, as he told David, he believed he could get cash.

On July 30, 1986, the SEC informed Kramer Levin that it was investigating the Colt transaction and requested the names of all those at the firm who knew of the transaction. Max Schwartz, a Kramer Levin partner, sent a memorandum to the attorneys who had worked on the transaction and asked that they identify anyone else who knew of it. Upon receiving this memorandum, Fleischer told Schwartz that he had told Grossman about the matter. Schwartz included Grossman's name on the list he sent the SEC.

On February 17, 1987, Grossman was arrested. On March 17, 1987, he was indicted (in the "first indictment") which charged him with twelve counts of securities fraud and twelve counts of mail fraud. The securities fraud counts charged Grossman with misappropriating confidential, non-public, information from Kramer

Levin. The mail fraud counts charged him with devising a fraudulent scheme to trade in Colt options using confidential information and causing mail to be delivered for the purpose of executing the scheme. The charges were based on events which occurred between July 11 and July 18, 1986.

Grossman moved to dismiss the first indictment, asserting among other things that it failed to state a crime; that it failed to state that he personally benefitted from the fraud; and that the misappropriated information was not "non-public". By an order entered June 26, 1987, Judge Owen denied the motion, although he observed that the charges in the indictment were extremely bare.

On July 23, 1987, the government sent Grossman's counsel a letter notifying them that Shimon Lev might have exculpatory information. Shimon had testified before the grand jury on April 23 and July 14, 1987 under a grant of immunity. The government later refused to turn over Shimon's grand jury testimony to Grossman.

On July 29, 1987, the court held a pre-trial conference. At this conference the government informed the court that during the preceding week it had notified Grossman's counsel that it planned to seek a superseding indictment, and that it had told Grossman's counsel of the contents of the planned superseding indictment. On Thursday, July 30, 1987, two business days before the trial was scheduled to begin, a superseding indictment (the "superseding indictment") was returned. The superseding indictment contained 38 counts, including 10 counts involving new transactions. These transactions concerned Listokin, whom the first indictment did not mention. Moreover, the superseding indictment expanded the time frame of the charges; while the first indictment covered only the week

of July 11-18, 1987, the superseding indictment covered a period longer than one year, from July 9, 1986 to July 30, 1987. The superseding indictment was filed on July 30, 1987. Grossman's motion to dismiss the superseding indictment was denied.

After a jury trial between August 3 and August 18, 1987, Grossman was convicted on all charges. He was sentenced on September 15, 1987 to concurrent two year prison terms on each of counts one through ten and twenty through thirty. He was fined $25,000. The court suspended Grossman's prison sentences on counts eleven through nineteen and thirty-one through thirty-eight. Grossman was placed on probation for five years upon release from prison. A $50 statutory assessment on each of the counts was imposed. Grossman currently is serving his prison sentence.

From the judgment of conviction, this appeal was taken.

II.

Grossman claims that the court erred in permitting the superseding indictment to be returned two business days before the trial was scheduled to begin. He cites *United States* v. *Wilks*, 629 F.2d 669, 672 (10 Cir. 1980), for the proposition that a superseding indictment may be returned any time before trial, absent prejudice to the defendant. He then asserts that he was prejudiced in several ways in this case. Assuming arguendo that Grossman is correct that a court may permit a superseding indictment to be returned only in the absence of prejudice to the defendant, his argument fails because the superseding indictment here

did not change substantially the nature of the government's case and caused no such prejudice to Grossman.

Grossman asserts essentially four claims of prejudice. First, he argues chiefly that the superseding indictment expanded the time frame of the charges and thereby allowed the government, through the testimony of David Lev, to introduce the co-conspirator statements of David and Shimon Lev and Norman Stein. He says that these statements were made after the July 11-18 period described in the first indictment and thus would not have been admissible under that indictment. He then asserts that he was prejudiced because these statements, which concerned in part Shimon Lev's plan to pay Grossman $25,000 for Grossman's share in the profits, provided the only evidence that Grossman personally benefitted from the scheme.

We find this argument to be frivolous. As the government succinctly points out, this evidence would have been relevant under the first indictment. Specifically, it would have been relevant under Fed. R. Evid. 401 because such evidence—including the evidence of Shimon Lev's intention to pay Grossman $25,000—tended to prove Grossman's motive and fraudulent intent which were disputed issues at trial. In the language of Rule 401, such evidence concerned facts that were "of consequence to the determination of the action." *See, e.g., United States v. Tager*, 788 F.2d 349, 352-53 (6 Cir. 1986) (evidence of previous unpaid tax judgment relevant to show intent and motive for securities fraud).

Grossman attempts to respond to this claim of the government by arguing that the superseding indictment at least "eased" the way for the introduction of the co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). He asserts that Rule 801(d)(2)(E) requires that co-

conspirator statements be made in furtherance of and during the course of a conspiracy in which the defendant was involved; that the statements in question here were made after the time frame of the first indictment had ended; that it was "hardly a forgone conclusion" that the district court would have admitted the statements under the first indictment; and that any presumption drawn in such a case should operate in the defendant's favor.

This reasoning strikes us as a smoke screen. It simply does not address the original flaw in Grossman's argument, namely, that the co-conspirator statements would have been *equally* admissible (or inadmissible) under either indictment because they were *relevant* under each. Whether they were admissible under Rule 801(d)(2)(E) is a concern entirely separate from the issue in the instant case. The sole issue here is whether the superseding indictment unfairly put Grossman in a worse position than had the first indictment. We conclude that it did not put him in a worse position. The expanded time frame of the superseding indictment did not in any way "ease" admission under Rule 801, because the government was not required to "charge a conspiracy to take advantage of Fed. R. Evid. 801(d)(2)(E)." *United States* v. *Stratton*, 779 F.2d 820, 829 (2 Cir. 1985), *cert. denied*, 476 U.S. 1162 (1986). "The Government merely needs to demonstrate that the declarant and the defendants against whom the statements are offered are members of a conspiracy in furtherance of which the statements are made, and that this conspiracy is 'factually intertwined' with the *offenses* being tried." *Id.* (citations omitted) (emphasis added) (quoting *United States* v. *Lyles*, 593 F.2d 182, 194 (2 Cir.), *cert. denied*, 440 U.S. 972 (1979). Thus, the indictment did not have to state explicitly the exact time frame that would become relevant at trial, as long as any co-conspirator statements the

government used were derived from a conspiracy that was "factually intertwined" with the offenses stated in the indictment.

In the instant case, Shimon Lev's statements about paying Grossman his share of the Colt profits undoubtedly were "factually intertwined" with "the offenses being tried", i.e., Grossman's misappropriation and dissemination of confidential information to generate those same Colt profits. More important, however, is the fact that the statements were *equally* "intertwined" with the offenses charged under either the first indictment or the superseding indictment. The government did not charge conspiracy under either indictment; the statement would have been equally admissible (or inadmissible) under either indictment; and thus the superseding indictment could not have prejudiced Grossman in the way claimed.

Second, Grossman argues that the superseding indictment prejudiced him because it failed to give him timely notice that he would have to explain Shimon Lev's statements about his plan to pay Grossman $25,000 or defend himself on the trades of his brother-in-law, Saul Listokin, which had not been included in the first indictment. He asserts that, had he been given earlier notice, he would have (1) attempted to identify the person who met with Gamby at Whitehall; (2) attacked the accuracy of the Kramer Levin telephone records; and (3) attempted to contact Bnos Rochel, the charity which Shimon Lev said he could use to launder the $25,000 payment to Grossman. Each of these assertions is without merit since Grossman in fact did have notice that these matters would be raised at trial. In April 1986, three months before the superseding indictment was returned, the government provided Grossman with full discovery regarding the Listokin trades, including

the telephone records. Grossman therefore both knew that the government would be using the Listokin trades at trial and had the opportunity to attack the telephone records for accuracy. Grossman also knew that the SEC had included the Listokin trades in its civil proceeding against Grossman. While Grossman claims that this fact should be discounted because the government has no case authority for the proposition that notice of the SEC's allegations "was the equivalent of notice that [he] would have to defend against those allegations in a criminal proceeding", Grossman simply ignores the fact that the issue, even as he frames it, is whether he was prejudiced by the new indictment. Since he in fact had notice of the Listokin trades and the government's interest in them, we are satisfied that in this particular case the defendant was protected from prejudice.

Third, Grossman argues that he was prejudiced because it was not until the superseding indictment was returned that the government charged that he personally benefitted from the scheme. This argument fails to recognize that no indictment is required to charge that a defendant personally benefitted from a crime—an indictment "need do little more than to track the language of the statute charged and state the time and place . . . of the alleged crime". *United States* v. *Tramunti*, 513 F.2d 1087, 1113 (2 Cir.), *cert. denied*, 423 U.S. 832 (1975). Accordingly, Grossman can hardly have been prejudiced by the absence of this optional information in the first indictment.

Fourth, Grossman argues conclusorily that the superseding indictment was returned for vindictive reasons, referring apparently to Grossman's refusal to plead guilty. Grossman has produced no evidence whatsoever of vindictiveness and, although we strongly dispprove of the prose-

cutor's tardiness in preparing the superseding indictment, we find no evidence suggesting a vindictive motivation.

In short, the superseding indictment did not alter substantially the government's case against Grossman. Its return, even two days before trial, caused him no prejudice. We hold that the court did not abuse its discretion in refusing to dismiss the superseding indictment or in failing to grant Grossman a continuance.

III.

We turn next to Grossman's claim that he was entitled to the grand jury testimony of Shimon Lev which he says was exculpatory. He asserts that the government violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), when it refused to turn over Shimon's allegedly exculpatory grand jury testimony. Grossman claims that Shimon's testimony would have been admissible under Fed. R. Evid. 804(b)(1) (former testimony) and Fed. R. Evid. 806 (impeachment of hearsay declarant). We find this claim to be without merit.

No *Brady* violation occurred here because *Brady* does not require the government to turn over exculpatory evidence "if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence." *United States* v. *Gaggi*, 811 F.2d 47, 59 (2 Cir.), *cert. denied*, 107 S.Ct. 3214 (1987). The rationale for our rule is that *Brady* is designed to "assure that the defendant will not be denied access to exculpatory evidence *only known to the Government*." *United States* v. *Leroy*, 687 F.2d 610, 619 (2 Cir. 1982) (emphasis added), *cert. denied*, 459 U.S. 1174 (1983). Accordingly, the government had a duty to disclose only "information which

had been known to the prosecution but unknown to the defense." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976). The government has no duty actually to turn over grand jury testimony where the defendant knows of the witness' identity; that the witness "might have testified before the grand jury"; and that "[the witness'] statements might have supported [the defendant's] defense." *LeRoy*, *supra*, 687 F.2d at 619.

LeRoy controls this case. Grossman knew of Shimon's identity. He had been informed specifically in the government's letter of July 23, 1987 that Shimon might have given the grand jury exculpatory evidence. While Grossman attempts to distinguish *LeRoy* on several grounds, none of the differences he asserts is significant—for example, the fact that LeRoy never explicitly asked the prosecution for the grand jury testimony does not change the analysis. While Grossman claims that he needed the actual transcripts of the grand jury testimony to impeach Shimon, his claim fails because, as stated above, he never raised his impeachment argument in the district court and therefore waived it.

We hold that the government was not obliged to provide Grossman with the grand jury testimony of Shimon Lev.

IV.

Grossman raises three other subordinate claims that warrant only brief mention: (1) that his mail fraud convictions should be reversed because Kramer Levin did not have a "property interest" in the misappropriated confidential information; (2) that his mail fraud convictions should be reversed because the mailings were merely "incidental" to his scheme to defraud; and (3) that the district

court should have instructed the jury to find whether Grossman knew of Kramer Levin's confidentiality policy and whether his disclosure would violate that policy. We find each of these claims to be frivolous.

First, Grossman says that the mail fraud statute, 18 U.S.C. § 1341 (1982),[2] protects only "property rights", *McNally* v. *United States*, 107 S. Ct. 2875, 2879 (1987), and does not protect intangible interests, such as the reputation of a business. He cites *Carpenter* v. *United States*, 108 S. Ct. 316 (1987), for the proposition that confidential business information will be "property" only when (1) the information is of commercial value to the holder of the information and that holder has exclusive right to exploit it; or (2) the holder of the information gathered it at the cost of its own "enterprise, organization, skill, labor and money." *Id.* at 321. Grossman then asserts that Kramer Levin had no "property interest" in the Colt confidential information because Kramer Levin (1) could not use the information for its commercial value or have the exclusive

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2 Section 1341 provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining *money or property* by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years or both."

18 U.S.C. § 1341 (1982) (emphasis added).

right to exploit it; and (2) did not gather the information through its own enterprise, organization, skill, labor and money. Grossman concludes that his mail fraud convictions should be reversed. We disagree.

His claim is specious and fails for several reasons. First, Grossman distorts *Carpenter*. In context, the language which he cites merely *describes* the confidential information in that case; it does not require that *all* confidential information must be of the same nature to be considered "property". *Id.* at 321. *Carpenter* actually holds generally that, even though "confidential business information" is intangible, it "has long been recognized as property." *Id.* at 320. Thus, the information in this case regarding the Colt recapitalization clearly falls within the definition of property under *Carpenter*. Second, the fact that Kramer Levin could not commercially exploit the information by trading on it does not mean the confidentiality of the information had no commercial value to the firm. As several partners of the firm testified, maintaining the confidentiality of the information was of commercial value because, by maintaining confidentiality, the firm would protect or enhance the firm's reputation, with the result that it would not lose its clients and perhaps would gain more clients.

Second, Grossman claims that the mail fraud convictions should be reversed because the mailings on which they were based were the mailings of confirmation slips from brokerage houses. He asserts that these mailings were only "incidental" to the fraud scheme and that the law requires that the mailings be "for the purpose of executing the scheme". *United States* v. *Lane*, 474 U.S. 438, 451 (1986); *see also United States* v. *Maze*, 414 U.S. 395, 400 (1974). Here, however, the mailings of the confirma-

tion slips *did* further the purpose of executing the scheme. The confirmation slips (1) notified the relatives that the purchase or sale actually had been completed; (2) provided an on-going tally of purchases, allowing the relatives to cover each other's positions; (3) concealed the fraud by maintaining an appearance of normality, *see United States* v. *Cohen*, 518 F.2d 727, 737 (2 Cir.), *cert. denied*, 423 U.S. 926 (1975); and (4) allowed the relatives to demonstrate ownership after the recapitalization announcement. *Pereira* v. *United States*, 347 U.S. 1 (1954).

Third, Grossman claims that the court should have charged the jury specifically to find whether he knew about Kramer Levin's confidentiality policy and whether his use of the confidential information would violate that policy. He theorizes that, since he was not on the team of attorneys who worked on the transaction, he might never have been told that information on the transaction was confidential and he might have thought that it was either public or not material. Grossman, however, did not object to the jury charge. Absent "plain error", therefore, he has waived this claim. *United States* v. *Arocena*, 778 F.2d 943, 948 (2 Cir. 1985), *cert. denied*, 475 U.S. 1053 (1986); Fed. R. Crim. P. 30, 52(b).

We hold that the district court was not required to charge the jury on Grossman's specific knowledge of the confidentiality policy; and that, even if the court had so charged, the jury was unlikely to have accepted the theory that Grossman did not realize he was doing anything improper. We therefore hold that the trial judge did not commit plain error.

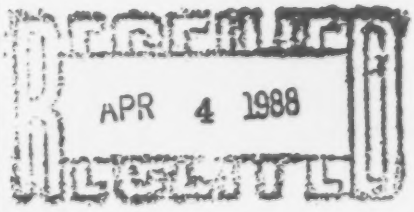
In short, having carefully considered all of Grossman's claims of error, including his subordinate ones, we hold that none has merit.

V.

To summarize:

We hold that the district court did not abuse its discretion in denying Grossman's motion to dismiss the superseding indictment and in failing to grant a continuance to prepare for trial under the superseding indictment. We also hold that the government was not obliged to provide Grossman with the grand jury testimony. We further hold that Grossman's subordinate claims of error are frivolous.

Affirmed.



725—3-29-88 • USCA—80004

APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 9th day of May one thousand nine hundred and eighty-eight.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v

ISRAEL G. GROSSMAN,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the **appellant ISRAEL G. GROSSMAN,**

Upon Consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

SUPREME COURT OF THE UNITED STATES

No. A-976

ISRAEL G. GROSSMAN,

Applicant,

- v -

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 5, 1988.

/s/Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 24th
day of June, 1988.